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No. 87-679

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALAN MCSURELY, PETITIONER

v.

GEORGE W. HUTCHISON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the dismissal of this *Bivens* action on the ground that the suit was precluded by Kentucky's one-year statute of limitation for personal injuries.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 823 F.2d 1002. The opinions of the district court (Pet. App. 9a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1987. The petition for a writ of certiorari was filed on October 22, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 413.140(1)(a) of the Kentucky Revised Statutes Annotated (Michie/Bobbs-Merrill 1972 & Supp. 1986) provides:

> Actions to be brought within one year. — (1) The following actions shall be commenced within one (1) year after the cause of action accrued:

(a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice or servant.

STATEMENT

On November 2, 1981, petitioner and his former wife initiated this suit in the United States District Court for the District of Columbia against the Federal Bureau of Investigation (FBI), the Department of Health and Human Services, the Office of Personnel Management, and respondent George W. Hutchison, a former FBI agent. As the result of several rulings[1] (none of which were appealed), petitioner emerged as the sole plaintiff, respondent emerged as the sole defendant, and petitioner's claims rested solely on allegations that respondent was liable in damages, under the principles of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), for violation of petitioner's constitutional rights.

While petitioner's action was pending, this Court decided *Wilson* v. *Garcia,* 471 U.S. 261 (1985), which held that the timeliness of actions brought under 42 U.S.C. 1983 alleging deprivation of constitutional rights is determined by reference to state statutes of limitation governing tort claims for personal injuries. Respondent requested the district

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[1] The court initially dismissed the action against the three government agencies and transferred the remaining claims against respondent to the United States District Court for the Western District of Kentucky. On November 22, 1983, that court dismissed the wife's complaint and four counts of petitioner's complaint (Pet. App. 37a-53a). The district court denied respondent's motion to dismiss four other counts and ordered supplemental briefing on the statute of limitation issues regarding those counts (*id.* at 50a). On September 18, 1984, the district court ruled that one of the remaining counts was barred by the statute of limitation (*id.* at 22a) but that three other counts were not (*id.* at 35a). The district court also granted petitioner's motion for leave to file an amended complaint (*id.* at 36a).

court to reconsider its previous statute of limitation ruling in light of *Wilson*. On December 11, 1985, the district court granted respondent's motion and dismissed petitioner's action with prejudice. Pet. App. 9a-18a. The court concluded that this Court's reasoning in *Wilson* concerning actions brought under 42 U.S.C. 1983 was equally persuasive in *Bivens* actions (Pet. App. 16a). It accordingly held (*id.* at 18a) that petitioner's action was precluded by Kentucky's one-year statute of limitation for personal injuries. See Ky. Rev. Stat. Ann. § 413.140(1)(a) (Michie/Bobbs-Merrill 1972 & Supp. 1986).[2]

The court of appeals affirmed the district court's decision. It first observed that the district court was correct in finding that "the record, when construed most favorably to [petitioner], leads inescapably to the conclusion that the limitations period began to run against [petitioner] more than one year prior to the filing of his complaint" (Pet. App. 4a). Next, the court of appeals determined that "an action against a federal officer for violation of a plaintiff's constitutional rights is analogous to 42 U.S.C. §§ 1981 and 1983 actions commenced against a state officer" (Pet. App. 5a). The court accordingly held that "[t]he reasoning of *Wilson* * * * appears to apply persuasively to the characterization of *Bivens* claims for purposes of applying statutes of limita-

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[2] The court specifically found that petitioner's cause of action accrued more than one year before the suit was filed, stating (Pet. App. 9a-10a):

> [I]n the previous opinion dealing with the statute of limitations, this Court held that plaintiff knew of Hutchison and his involvement in the matters complained of in this action at least as early as September 24, 1979, and that this knowledge was implemented on July 15 and 31, 1980 when plaintiff deposed FBI Special Agent Burke, used exhibits with the initials "GWH," and questioned Burke about defendant Hutchison. It further will be recalled that the plaintiff's action was not filed until November 2, 1981.

tions" (Pet. App. 5a) and affirmed the district court's selection of the one-year Kentucky statute of limitation for an "action for an injury to the person" (Ky. Rev. Stat. Ann. § 413.140(1)(a) (Michie/Bobbs-Merrill 1972 & Supp. 1986)) in place of Kentucky's five-year period for "an action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated" (*id.* § 413.120(7) (Michie/Bobbs-Merrill 1972)). Pet. App. 6a.

The court of appeals rejected petitioner's contention that this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), required that the one-year limitation period apply "prospectively only" (Pet. App. 7a). The court determined that it could not "conclude that any longer applicable statute had been clearly established for *Bivens*-type cases at the time [petitioner's] cause of action arose here, which would make retroactive application of the rule unfair, or otherwise violative of the principles of *Chevron* v. *Huson*" (Pet. App. 7a). The court accordingly affirmed dismissal of petitioner's complaint on statute of limitation grounds.

ARGUMENT

Petitioner contends that his *Bivens* action is not subject to Kentucky's one-year statute of limitation for personal injuries. He further contends that, even if that is the appropriate statute of limitation, the district court should not have applied that limitation period in this case. The court of appeals correctly rejected these contentions. Its decision is consistent with *Wilson* v. *Garcia, supra,* and does not conflict with any decision of this Court or another court of appeals. There is, accordingly, no warrant for further review.

1. "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is

not inconsistent with federal law or policy to do so." *Wilson* v. *Garcia*, 471 U.S. at 266. In *Wilson*, this Court held that the timeliness of actions brought under 42 U.S.C. 1983 alleging deprivation of constitutional rights should be determined by reference to the local statute of limitation governing tort claims for personal injuries. In this case, the court of appeals applied the reasoning of *Wilson* to *Bivens* actions, and concluded that the same statutes of limitation should apply.

This result is both sensible and correct. Section 1983 actions against state officials and *Bivens* actions against federal officials are closely analogous remedies. The Court has frequently relied simultaneously without comment or distinction on *Bivens* and Section 1983 cases. *E.g.*, *Forrester* v. *White*, No. 86-761 (Jan. 12, 1988), slip op. 5; *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n.30 (1979); *Butz* v. *Economou*, 438 U.S. 478, 496-504 (1978). The lower courts follow the same practice. See, *e.g.*, *Ellis* v. *Blum*, 643 F.2d 68, 84 (2d Cir. 1981).

Thus, it is wholly appropriate that *Bivens* actions and Section 1983 actions should be subject to the same statutes of limitation. *Bivens* claims, like Section 1983 claims, "can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations" (*Wilson*, 471 U.S. at 272-273). Both remedies "encompass[ ] a broad range of potential tort analogies, from injury to property to infringements of individual liberty" (*id.* at 277). But both remedies ultimately stress protection of *personal* constitutional rights. Compare *Wilson*, 471 U.S. at 277-279, with *Bivens*, 403 U.S. at 389-390, 391-392, 395-397. Thus, *Bivens* claims, like Section 1983 claims, "are best characterized as personal injury actions" (*Wilson*, 471 U.S. at 280) for purposes of borrowing an appropriate state statute of limitation. See also *Goodman* v. *Lukens Steel Co.*, No. 85-1626

(June 19, 1987) (applying *Wilson*'s reasoning to 42 U.S.C. 1981 actions).

Since this Court decided *Wilson*, only the Sixth Circuit here, and the Second Circuit in *Chin* v. *Bowen*, 833 F.2d 21 (1987), have addressed the question whether *Bivens* actions should be subject to the same statutes of limitation as Section 1983 actions, and both have concluded that the same statutes of limitation should apply. Indeed, *Chin* rejected the precise arguments petitioner presents here, finding them "wholly unpersuasive" (*id.* at 23-24). Contrary to petitioner's assertion, there is no "clear conflict between the Sixth and the Ninth Circuits" (Pet. 14). The Ninth Circuit encountered the issue in *Gibson* v. *United States*, 781 F.2d 1334 (1986), cert. denied, No. 86-676 (Jan. 20, 1987), but declined to decide it, stating:

> The Supreme Court has yet to decide whether its reasoning in *Wilson v. Garcia* means that *Bivens* claims should also be analogized to state personal injury tort claims for limitation purposes. Recognizing that *Wilson* may require a re-examination of *Marshall v. Kleppe*, [637 F.2d 1217 (9th Cir. 1980),] * * * *we do not find this an appropriate occasion for so doing:* even were we to overrule Marshall, we would not apply a shorter statute of limitations retroactively to bar claims such as plaintiffs' that were timely when filed.

Gibson, 781 F.2d at 1342 n.5 (emphasis added).[3] Thus, the Ninth Circuit has not determined whether *Wilson*'s reasoning should be applied to *Bivens* actions. See also *Chin*, 833 F.2d at 24 n.4 (noting that the Sixth Circuit "is the only

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[3] In *Marshall*, the court of appeals held that *Bivens* actions arising in California are subject to the four-year catch-all period of limitations set forth in Section 343 of the California Civil Procedure Code (West 1982). See 637 F.2d at 1223-1224.

Court of Appeals to consider the question presently before us").

There is accordingly no post-*Wilson* conflict in the circuits on this question and no need for this Court to address it now.

2. Petitioner's contention that the district court should have prospectively applied its ruling is likewise not worthy of further review. "The usual rule is that federal cases should be decided in accordance with the law existing at the time of decision." *Goodman,* slip op. 4-5 (citing cases). "But *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), advises that nonretroactivity is appropriate in certain defined circumstances." *Goodman,* slip op. 5. At a minimum, "the decision to by applied nonretroactively must establish a new principle of law, either by overruling clear past precedent * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed" (*Chevron Oil Co.,* 404 U.S. at 106 (citations omitted)). This case fails to satisfy even that test. The Sixth Circuit, upon reviewing its own precedents, stated:

> We are unable to conclude that any longer applicable statute had been clearly established for *Bivens*-type cases at the time plaintiff's cause of action arose here, which would make retroactive application of the rule unfair, or otherwise violative of the principles of *Chevron* v. *Huson.*

Pet. App. 7a-8a.[4] The Sixth Circuit's law concerning the appropriate limitation period for *Bivens* actions was perhaps

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[4] Petitioner's contention (Pet. 14-15) that "Sixth Circuit law had a clear precedent" for the appropriate statute of limitation in his case is inaccurate. The two Sixth Circuit cases cited by petitioner (Pet. 15)—*Mason* v. *Owens-Illinois, Inc.,* 517 F.2d 520 (1975) and *Garner* v. *Stephens,* 460 F.2d 1144 (1972)—are not *Bivens* cases. They are, respectively, 42 U.S.C. 1981 and 42 U.S.C. 1983 actions.

unsettled, but that situation is insufficient to support nonretroactive application of the clarifying decision. See *Goodman,* slip op. 5-6; *Smith* v. *Pittsburgh,* 764 F.2d 188, 194-195 (3d Cir.), cert. denied, 474 U.S. 950 (1985).

Petitioner further contends that further review is warranted because the Sixth Circuit's refusal to give its decision retroactive effect conflicts with the Ninth Circuit's decision in *Gibson* v. *United States, supra.* The different results in petitioner's case and *Gibson*, however, simply reflect the Ninth Circuit's determination that application of *Wilson*'s reasoning to *Biven's* actions would result in the overruling of clearly established *Ninth Circuit* precedent. See *Gibson,* 781 F.2d at 1342 n.5, citing *Marshall* v. *Kleppe,* 637 F.2d 1217 (9th Cir. 1980). This circumstance does not reflect any disagreement among the circuits with respect to principles governing nonretroactivity determinations and does not present any question warranting this Court's review. Indeed, this Court has already given the lower courts ample guidance for applying *Chevron Oil Co.* principles. See *Goodman* v. *Lukens Steel Co., supra*; *Saint Francis College* v. *Al-Khazraji,* No. 85-2169 (May 18, 1987), slip op. 3-4.

Finally, there is no merit to petitioner's contention that the Sixth Circuit should have looked to the law of the D.C. Circuit—where the suit was originally filed—to make its retroactivity determination. As the Sixth Circuit explained (Pet. App. 7a-8a):

> Clearly, it would be inequitable, under *Chevron* standards, to permit the plaintiff to bring a suit in Kentucky that is barred by the Kentucky statute of limitations, upon the basis that he was originally justified, by a District of Columbia statute of limitations, in bringing the action in the District of Columbia, which has no interest in the parties or the claim.

Petitioner's contention on this score is tied to the particular procedural history of this case and presents no question of national or continuing importance justifying this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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